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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 212

PATRICK HENRY, DAVID D. LARSEN, STEWART B. KETT, JAMES B. GLENN, JR., d/b as SUBURBAN BROADCASTERS,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 26, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Patrick Henry, David D. Larsen, Stewart B. Kett, James B. Glenn, Jr., d/b as Suburban Broadcasters, petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Court below (Appendix, pp. 1a to 5a) is officially reported in 302 F. 2d 191 (U.S. App. D.C. 1962). The decision of the Federal Communica-

tions Commission (J.A. 52-55)[1] is reported in 20 Pike & Fischer, Radio Regulations 951 (1961).

JURISDICTION

The judgment of the Court below was entered on March 29, 1962, Appendix, p. 6a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's denial, based upon a finding that Appellant's program proposal was not "'designed' to serve the needs of Elizabeth," and that no investigation of the needs of the area had been made, is, in reality, censorship of these proposals and specifically violates the provisions of Section 326 of the Communications Act of 1934, as amended, and deprives Petitioner of the protection of the First Amendment guaranteeing freedom of speech.

2. Whether the Commission has the statutory authority to inquire into the needs of the area proposed to be served by the applicant, to pass judgment upon the adequacy of the applicant's proposed programming to meet these needs, and to deny the application for failure to investigate these needs.

STATUTES INVOLVED

The First Amendment of the United States Constitution and the relevant portions of the Communications Act of 1934, as amended, 48 STAT. 1064, 47 U.S.C. § 151, *et seq.*, are set forth in the Appendix, pp. 6a to 7a.

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[1] Reference is to the page of the Joint Appendix in the Court below.

STATEMENT

Petitioner filed its application for a construction permit for a new FM station on July 10, 1959, and on August 7, 1959, it was accepted for filing by the Commission. On December 22, 1959, the Commission issued an order setting the application for hearing on technical engineering issues only and, except for the facts involved in these issues, found that Petitioner was legally, technically, financially and otherwise qualified to construct and operate the instant proposal. Metropolitan Broadcasting Corporation, the licensee of Station WNEW-FM, New York, New York, was made a party to the proceeding because of the potential interference to it by the proposed station. No competing application for the same facilities was involved.

On the request of Metropolitan Broadcasting Corporation and over the opposition of Petitioner, the Commission on May 23, 1960, released a Memorandum Opinion and Order, adding the following issue to the hearing:

> "To determine whether the program proposals of Suburban Broadcasters are designed to and would be expected to serve the needs of the proposed service area." (J.A. 11).

The evidentiary hearing on this issue was held on July 12, 1960, and the record closed on that date. To meet the issue, Petitioner introduced an exhibit (R. 264-280)[2] which described in detail the content of each program proposed to be broadcast by Petitioner's station.

On the basis of Petitioner's direct testimony, the Commission's Broadcast Bureau concluded in its "Pro-

[2] Reference is to the page of the record in the Court below.

posed Findings and Conclusions" that ". . . the programs proposed by Suburban are 'designed to and would be expected to serve the needs of the area'," and that ". . . the public interest, convenience, and necessity would be served by a grant of . . ." Petitioner's application. (R. 353, 357)

On October 6, 1960, the Examiner released an Initial Decision granting Petitioner's application. He found that Petitioner's program proposals were copied from an earlier application filed for an FM station at Alameda, California, and were prepared by Petitioner's partners without any discussion with anyone in Elizabeth. (J.A. 37-38). The Examiner emphasized that the program issue was limited in scope and simply contemplated a determination as to whether Petitioner's program proposals ". . . are 'designed' to serve the 'needs' of the proposed service area . . ." and ". . . 'would be expected' to serve these needs. . . .", (J.A. 43). He then concluded that Petitioner had met the issue. (J.A. 45).

Metropolitan filed exceptions to the Initial Decision on November 21, 1960. (R. 399-417). With respect to the programming issue, the Broadcast Bureau excepted only to the Examiner's ruling that the Commission's Policy Statement[3] is not applicable to applicants for new broadcast facilities. (R. 397). The Broadcast Bureau contended that the policy was applicable to new applicants but that, in this case, Petitioner's principals, ". . . who have had broadcast experience, determined upon a programming framework within which they would formulate specific programs

[3] *Report and Statement Of Policy Re: Commission En Banc Programming Inquiry* 20 Pike & Fischer, Radio Regulations 1901 (July 27, 1960).

to meet the particular needs of the community and area." (R. 432). In other words, the Broadcast Bureau advised the Commission that, in its opinion, Petitioner had met the programming issue and that the Examiner had correctly decided that Petitioner's application should be granted.

Petitioner, in lieu of formal exceptions, filed a "Statement In General Support of Initial Decision," in which exception was taken to all of the Examiner's conclusions and remarks having to do with the Policy Statement on the basis that contentions with respect thereto were irrelevant, immaterial and beyond the scope of the issues. In this statement, Petitioner again questioned the materiality and legality of the programming issue.

On July 5, 1961, the Commission released its Final Decision (J.A. 52-55) in which it concluded that the interference and other engineering considerations did not bar a grant of Petitioner's application, but that the application should be denied because Petitioner had not investigated the needs of the area prior to filing its application and because ". . . Suburban's program proposals were not 'designed' to serve the needs of Elizabeth." (J.A. 54).

Upon appeal, the Court below concluded that the case was controlled by this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 87 L. Ed. 1344 (1943) and that issues of the statute's proscription of censorship and the constitutional guarantee of free speech raised by Petitioner were not involved in the instant case. In affirming the Commission's decision, the Court of Appeals stated:

> "As we see it, the question presented on the instant record is simply whether the Commission

may require that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with is particular needs and an effort to meet them." Appendix, p. 5a.

REASONS FOR GRANTING THE WRIT

This case raises important and far-reaching issues involving an extraordinary claim by the Commission of the power to control the business and programming of broadcast stations. This is the first instance that the Commission has ever asserted the authority, in a non-comparative proceeding, to deny an application of an applicant found to be legally, technically, financially and otherwise qualified to be a licensee solely because of programming reasons.[4]

The importance of this decision can also be illustrated by the repeated references made thereto by the Chairman of the Commission in his recent speeches[5]

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[4] "For the first time, the Commission denied an application for a new broadcast station solely on the grounds of inadequate programming preparation. On June 28, 1961, it turned down the application of Suburban Broadcasters for a new FM station at Elizabeth, N. J., because it failed to determine the programming needs of the community intended to be served." (Federal Communications Commission, *27th Annual Report*, Fiscal Year 1961, Page 38).

[5] "Let me recall with you some of these vital words in the Commission's 1960 Programming Policy Statement, a policy which only last week won the approval of the Court of Appeals in the *Suburban* decision. Our 1960 Statement says:

> 'The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This again, is a duty personal to the licensee and may not be avoided by delegation of responsibility to others.'"

Address by Newton N. Minow, Chairman, Federal Communications Commission, April 3, 1962, Mimeo No. 18306, Page 11.

and annual report.[6] This decision is also the basis for a proposed new set of program requirements in applications that will require the applicant to demonstrate his knowledge of the area, the needs of the area, and how he is meeting these needs.[7]

A. The Commission's Action Constitutes Censorship

The First Amendment of the Constitution and Section 326 of the Communications Act of 1934, as amended, prohibit the Federal Communications Commission from censoring the programs of a broadcast station. The Court below held that the Commission's action did not constitute censorship but was fully in accord with this Court's ruling in *National Broadcasting Co.* v. *United States, supra.* The Court of Appeals stated that this Court had held that ". . . the Commission may impose reasonable restrictions upon the grant of licenses to assure programming designed to meet the needs of the local community." Appendix, p. 5a

It is submitted that the lower Court has extended the ruling in the *National Broadcasting Co.* case far beyond its original scope and has, in effect, emasculated Section 326 of the Communications Act and unconstitutionally restricted the First Amendment's application to broadcasting. The fact is that the action of the Commission does constitute censorship and such an assertion of power by an administrative agency should not be accepted without the specific approval of this Court.

The issue added by the Commission required a conclusion that the program proposals would or would not

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[6] See Note 4, *supra.*

[7] *Id.* at 41.

serve the needs of the proposed service area. The Commission's denial of the application answered the question posed by that issue in the negative—i.e., it concluded that the programs *were not* designed to and *would not* be expected to serve the needs of the proposed service area. The statements of the Commission, cited by the Court below, are merely the reasons why the Commission concluded that the proposed programming would not serve the needs of the area. No matter how the decision may be rationalized, the Commission denied a license application because it could not affirmatively find that the programming would meet the needs of the proposed service area.

The result of granting this power to an administrative agency is patent. First, the agency can require a showing of needs which must meet its approval. Second, it can require a showing that the proposed programming will meet these needs. It obviously follows, therefore, that the agency has acquired the means to compel an applicant to present programs in accord with the agency's beliefs. The broadcaster's right to give the public what he believes it wants, what he thinks will find acceptance in the free and open market, is forever lost.

Moreover, the practical impact of the decision on administrative procedures and freedom of speech should not be ignored by this Court. The right of an agency to approve the applicant's or licensee's showing of need gives it a method to use in compelling adherence to its views without taking any action that can be appealed to the Courts. It can address repeated letters to a broadcaster demanding explanations for failure to recognize alleged needs; it can require further investigations to justify what the Commission believes

to be unpopular or unconventional programming;[8] and it can threaten extended investigations and hearings unless changes are made. All these actions will invariably result in complete capitulation by the broadcaster to the views of the Commission rather than risk further harassment and extended and expensive hearings. Such practical program supervision can legally exist only by virtue of the authority asserted for the first time in this case.

A requirement that newspapers or magazines must demonstrate the needs of the area and describe how they intend to meet these needs before they would be given second-class mailing privileges would be clearly unconstitutional. A requirement that Billy Graham investigate the religious needs of the area before he would be given a license to appear at a local rally would be equally illegal.[9] Yet, the Commission and the lower Court apparently contend that broadcasters are different from newspapers, magazines and local speakers and that the same principles of freedom of speech and press do not apply to each. The Com-

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[8] As a typical example of these letters, see Appendix, p. 8a.

[9] The Broadcast Bureau of the Commission has already taken this position. It has asked that an applicant who proposed to devote 46.8% of the program time of a proposed FM station to religion be required to meet the following issue:

> "To determine whether the program proposals and policies of the Christian Broadcasting Association of New England, Inc. are designed to and would be expected to serve the needs of its proposed service area."

The issue was originally requested by the opposing applicant on the basis of the Commission's decision in the *Suburban* case. The case involves 307(b) issues only and thus is non-comparative insofar as programming is concerned. *Broadcast Bureau's Comment Re North Attleboro's "Petition To Enlarge Issues"*, Docket No. 14601, (Filed May 28, 1962).

mission has contended that this difference has been approved by this Court's ruling in the *National Broadcasting Co.*, case, *supra*. Yet, today, broadcasting is by far the most effective and comprehensive media for the dissemination of information left in the United States. In practically every market, there are more competitive broadcast outlets than newspapers or magazines. In coverage and number of outlets, it far exceeds any other informational source.[10] It is inconceivable that the First Amendment should be construed to protect the few and rapidly dwindling newspapers and magazines from Government control and yet allow the Federal Communications Commission to supervise what can be said to the American people over broadcast stations.

It is equally difficult to believe that the word "censorship" written into the Communications Act to prevent previous restraint by the Government should be subject to such a widely different interpretation when applied to other means of communication. Petitioner was denied a license because the Government did not approve of the way it ascertained the need for its proposed programs. Both the Commission and the lower Court contended that this was just a requirement for a license that was encompassed within the phrase "public interest, convenience and necessity." Such a requirement applied to any other media would be quickly and effectively recognized for what it is—a device to circumvent the specific and unambiguous prohibition of the statute. It is submitted that such an extension of statutory power, which ignores a clear

[10] As of June 30, 1961, there were 650 commercial television stations, nearly 1,100 commercial FM stations and more than 3,700 AM stations in operation. *27th Annual Report*, pp. 4-5.

and unambiguous limitation in the statute, should not be permitted to stand as controlling without the express approval of this Court.

B. Failure to Follow a Decision of This Court

If the Commission and lower Court's interpretation of the First Amendment and Section 326 are correct and the complained of action is not a violation of the protection afforded by these provisions, the action raises another serious and important question of Commission power. The Commission held that it was merely trying to compel Petitioner to find out the needs of the area and then apply its own judgment on how best to meet those needs. Such a requirement has no specific basis in the Communications Act of 1934, as amended, and none is cited but the all-encompassing phrase "public interest, convenience and necessity."

It is submitted that this Court should accept the case for review because of this important new assertion of Commission power and because of the lower Court's failure to follow or even consider the principle established by this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 84 L. Ed. 869 (1940).[11] In the instant case, the Com-

[11] The lower Court also ignored its own statement of the same principle in *Easton Publishing Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 33, 35, 175 F. 2d 344, 346 (1949) where it stated as follows:

> "The Supreme Court made clear in its opinion in Federal Communications Comm'n. v. Sanders Bros. Radio Station that Congress intended to make broadcasting a competitive business, and that the usual rules relating to the certification of public utilities do not apply. It said (309 U.S. at 475, 60 S. Ct. at page 697, 84 L. Ed. 869): 'In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without inter-

mission found that there was nothing wrong with the proposed programming, but denied the application because Petitioner had not determined the "needs" of the area to be served in a manner approved by the Commission. The lower Court held that the Commission did no more than require ". . . that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them." Appendix, p. 5a.

Petitioner had prepared, to its own satisfaction, a proposed program schedule which would permit it to operate an FM station successfully in Elizabeth, New Jersey, in competition with the existing media of communications (newspapers, magazines, and other broadcast stations). By denying the application, the Commission has asserted the right to control the business judgment of an applicant, and to require it to investigate the needs of the area and then program to meet the needs of the area *as the Commission feels they should be met.* As a result, it is beyond the scope of

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ference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.' Under that view of the statute, the public interest, convenience and necessity to which the Act refers are served by effective competition among strong competitors. Competition, of course, is between broadcasters on different frequencies covering the same area. *If there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements, of the applicant to render service are immaterial.* But, if a choice must be made between two qualified applicants, the problem has a different aspect. And, if a choice must be made between two communities, still further considerations are involved. In the latter case, the public interest and an equitable distribution of service may well require a determination of the relative needs of the communities for more service . . ." (Italics supplied)

credibility to believe that applicants will not propose programming that is in compliance with the programming guides and policy previously announced by the Commission. Moreover, once given the power to require the production of information on needs, it is doubtful that the agency will accept programs that do not conform to these published norms. If the power to require the investigation of needs is upheld, the power to control the commodity to be sold will also be established.

The selection of programming is an essential part of the business of broadcasting since it is *the only service* a broadcaster sells on the open market. Both the Commission and the Court below ignored the clear and explicit admonition of this Court that such supervision is beyond the authority of the Commission:

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under the license.
>
> "In contradistinction to communications by telephone and telegraph, which Communications Act recognizes as a common carrier activity and

regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

* * *

". . . the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

* * *

". . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." *Federal Communications Commission* v. *Sanders Bros. Radio Station, supra,* at 474, 84 L. Ed. at 873.

The simple fact of the matter is that the Communications Act of 1934, as amended, does not give the Commission authority to regulate the business of

broadcasting, as such, except in certain limited respects, all of which are specifically provided for in the Act and none of which obligate the applicant for a radio broadcast station to determine the needs of the community where he proposes to locate his station or to design his programming to meet those or any other needs. Furthermore, none of the few provisions in the Communications Act, which apply specially to broadcast stations, authorize the Commission to deny an application for an available frequency in the broadcast band because (1) there is no need for the station, (2) because the applicant has not determined community needs, (3) because the applicant has not designed his program to meet these needs, or (4) because the applicant's proposed programs would not be expected to meet community needs, whether or not determined by the applicant. If Congress had intended to impose such obligations on applicants for broadcast station licenses and to empower the Commission to consider such matters in exercising its licensing responsibilities, the legislation would have so provided.

It is not necessary to cite authorities for the proposition that the paramount public policy of the United States as to the relationship of government to business is firmly grounded upon the principle of free and competitive business enterprise and that exceptions to that policy at the Federal level can be made only by Congress. Tampering with a free competitive business by government to the extent of permitting that business to operate only if a public need is established, or of requiring the operator of the business to select his product or service on the basis of pre-established tastes, needs and desires of the public in his com-

munity, places that business at least in a public utility category, if not in a category subject to even more governmental supervision, direction, and control than attaches to public utilities.

Petitioner was not involved in a comparative case with a competing applicant. It was found to be qualified to be a licensee in every respect. It had proposed a program schedule that it felt would obtain public acceptance. It did not desire any further facts or investigation in order to conclude that it was willing to risk its capital and time upon that determination. This Court has said that Congress required no more of a qualified applicant. It is essential that this Court should either reaffirm or delete that interpretation of the Communications Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 26, 1962

Opinion

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16526

PATRICK HENRY, ET AL.,
D/B AS SUBURBAN BROADCASTERS, *Appellants*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

On Appeal from a Decision and Order of the Federal Communications Commission

Decided March 29, 1962

Mr. Robert L. Heald, with whom *Messrs. Edward F. Kenehan* and *Henry R. Goldstein* were on the brief, for appellants.

Mr. Daniel R. Ohlbaum, Assistant General Counsel, Federal Communications Commission, with whom *Messrs. Max D. Paglin*, General Counsel, Federal Communications Commission, and *Ernest O. Eisenberg*, Counsel, Federal Communications Commission, were on the brief, for appellee. *Mrs. Ruth V. Reel*, Counsel, Federal Communications Commission, also entered an appearance for appellee.

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

BAZELON, *Circuit Judge:* Appellants, doing business as Suburban Broadcasters, filed the sole application for a permit to construct the first commercial F.M. station in Elizabeth, New Jersey.[1] Although the Federal Communications Commission found Suburban legally, technically and financially qualified, it designated the application for

[1] The Communications Act of 1934 § 319, 48 Stat. 1089, 47 U.S.C. § 319 (1958), forbids the Commission to license a station unless its construction has previously been authorized by a permit issued pursuant to §§ 308 and 309, 48 Stat. 1084-85 (1934), 47 U.S.C. §§ 308, 309 (1958).

hearing on the issues raised by the claim of Metropolitan Broadcasting Company, the licensee of WNEW in New York, that a grant would result in objectionable interference. At Metropolitan's request, the Commission subsequently added another issue for hearing:

> To determine whether the program proposals of Suburban Broadcasters are designed to and would be expected to serve the needs of the proposed service area.

Upon hearing, the trial examiner found for Suburban on both issues. The Commission affirmed on the issue of objectionable interference but reversed on the issue relating to the program proposals and denied the application. Suburban appeals.

These are the pertinent facts disclosed by the record. None of Suburban's principals were residents of Elizabeth. They made no inquiry into the characteristics or programming needs of that community and offered no evidence thereon. Suburban's program proposals were identical with those submitted in its application for an F.M. facility in Berwyn, Illinois, and in the application of two of its principals for an F.M. facility in Alameda, California.[2]

Although the trial examiner resolved the program planning issue in favor of Suburban, he noted that its approach might be characterized as "cavalier" or little more than a "quick shrug." He also referred to the "Program Policy Statement," released by the Commission July 29, 1960, to the effect that the broadcaster's programming responsibility is measured by the statutory standard of "public interest, convenience or necessity," and that in meeting such standard the broadcaster is "obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the

[2] The application for the Berwyn facility was dismissed; the one for Alameda was granted.

public in his community and to provide programming to meet those needs and interests." But the examiner stated that these standards were intended for existing licensees, rather than applicants for new stations, and were therefore inapplicable here.

In reversing the examiner, the Commission (with one Commissioner absent and two dissenting) stated:

> We agree [with the examiner] that Elizabeth has a presumptive need for a first local FM transmission service. We have generally presumed that an applicant for such a community would satisfy its programming needs, assuming that the applicant had at least a rudimentary knowledge of such needs. However, we cannot indulge in that presumption where the validity of the underlying assumption is questioned, a specific issue is added, and it is demonstrated that the applicant has taken no steps to familiarize himself with the community or its needs. It is not sufficient that the applicant will bring a first transmission service to the community—it must in fact provide a first local outlet for community self-expression. Communities may differ, and so may their needs; an applicant has the responsibility of ascertaining his community's needs and of programming to meet those needs. As found by the Examiner, Suburban's principals made no inquiry into the characteristics of Elizabeth or its particular programming needs. The instant program proposals were drawn up on the basis of the principals' apparent belief—unsubstantiated by inquiry, insofar as the record shows—that Elizabeth's needs duplicated those of Alameda, California, and Berwyn, Illinois, or, in the words of the Examiner, could "be served in the same manner that such 'needs' are served by FM broadcasters generally."

The Commission found that the "program proposals were not 'designed' to serve the needs of Elizabeth"; and that it could not determine whether the proposals "would

be expected" to serve these needs, since no evidence of these needs was offered. "In essence," said the Commission, "we are asked to grant an application prepared by individuals totally without knowledge of the area they seek to serve. We feel the public deserves something more in the way of preparation for the responsibilities sought by applicant than was demonstrated on this record." Accordingly, the Commission held that "it cannot be concluded that a grant . . . would serve the public interest, convenience and necessity."

Appellants contend that the statutory licensing scheme requires a grant where, as here, it is established that the sole applicants for a frequency are legally, financially and technically qualified. This view reflects an arbitrarily narrow understanding of the statutory words "public convenience, interest, or necessity."[3] It leaves no room for Commission consideration of matters relating to programming. Moreover, appellants urge that consideration of such matters is precluded by the statute's proscription of censorship[4] and the constitutional guarantee of free speech.

We think these broad contentions are beside the narrow point at issue upon this record. It may be that a licensee must have freedom to broadcast light opera even if the community likes rock and roll music, although that question is not uncomplicated. Even more complicated is the question whether he may feed a diet of rock and roll music to a community which hungers for opera. These

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[3] Communications Act of 1934 § 307(a), 48 Stat. 1083, 47 U.S.C. § 307(a) (1958). The statute directs the Commission to grant a station license to any applicant "if public convenience, interest, or necessity will be served thereby."

[4] "Nothing in this act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." Communications Act of 1934 § 326, 48 Stat. 1091, 47 U.S.C. § 326 (1958).

are questions, however, that we need not here decide. As we see it, the question presented on the instant record is simply whether the Commission may require that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them.

We think *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), settles the narrow question before us in the affirmative. There, the Commission promulgated regulations which provided, *inter alia*, that no license would be granted to stations whose network contracts would prevent them from developing programs "to serve the needs of the local community." 319 U.S. at 203. National Broadcasting Company challenged the regulations on precisely the grounds appellants advance here: that since the regulations were calculated to affect program content, they exceeded statutory and constitutional limitations. In sustaining the regulations, the Supreme Court held that the Commission may impose reasonable restrictions upon the grant of licenses to assure programming designed to meet the needs of the local community. We think it clear that the Commission's action in the instant case reflects no greater interference with a broadcaster's alleged right to choose its programs free from Commission control than the interference involved in *National Broadcasting Co.*[5]

Affirmed.

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[5] Appellants also complain that they were surprised by the Commission's insistence that they be familiar with the needs of the community they sought to serve. But that requirement is not new. See *Kentucky Broadcasting Corp.* v. *Federal Communications Comm'n*, 84 U.S. App. D.C. 383, 174 F. 2d 38 (1949); *Sanders*, 2 F.C.C. 365, 372 (1936); *Egeland*, 6 F.C.C. 278 (1938); *Brownsville Broadcasting Co.*, 2 F.C.C. 336, 340 (1936) (alternative ground); *Martin*, 3 F.C.C. 461 (1936) (alternative ground); *Goldwasser*, 4 F.C.C. 223 (1937) (alternative ground); *Kraft*, 4 F.C.C. 354 (1937) (alternative ground). And the question whether appellants had demonstrated such familiarity was within the scope of the issues designated for hearing.

[Filed Mar. 29, 1962]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

No. 16,526

PATRICK HENRY, ET AL.,
D/B AS SUBURBAN BROADCASTERS, *Appellants*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

On Appeal from a Decision and Order of the Federal Communications Commission

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decision and order of the Federal Communications Commission on appeal in this case is affirmed.

Per Circuit Judge BAZELON.

Dated: March 29, 1962.

Constitutional Provisions and Statutes Involved

Constitution:

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exer-

cise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statutes:

Communications Act of 1934, as amended, 47 USC 151, et seq.:

SEC. 309.(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

SEC. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Exhibit No. 2

(Docket No. 13961, Comments of Spearman & Roberson, filed October 2, 1961.)

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.
September 19, 1961

Gentlemen:

This is with reference to your letter of ....., in which you set forth certain modifications made in the program proposals for Stations ....., ...

In your letter, you state, in part, that with respect to Station ....., you have revised your Religious, Agricultural and Educational program proposals from 5.9%, 1.5%, and 2.1%, respectively, as set forth in your application (.....) for assignment of license filed on ...., to 2.8%, .5%, and 1.2%, respectively. With respect to Station ....., you have revised your Entertainment, Religious, Agricultural and Educational program proposals from 74.1%, 5.9%, 1.5%, and 2.1%, respectively, as set forth in your application (.....) for assignment of license filed on ....., to 85%, 2.1%, .4%, and .8%, respectively. In your letter of ...., with respect to the stations' practices concerning the number and length of spot announcements allowed in a given period, you stated:

> "The policy of limiting the total amount of commercial copy in a 14½ minute segment, to three to four minutes, depending on conditions, still remains in effect."

In the instant letter, you state:

> "It shall be the policy of Stations ..... to limit the average commercial content of spot announcements in a 14½ minute segment to approxi-

mately 4 minutes, which would permit four spot announcements of one minute in length or more of lesser duration. It is proposed that the length of spot announcements will normally be limited to one minute."

You state in your letter that the reasons for the above revisions in your program proposals are due, in substance, to "a marked slowing of area growth and resultant shift of emphasis now toward consolidation and improvement of existing services and facilities"; the large number of transient government families who live in the area "for only a comparatively short while but who, nevertheless, are keenly interested in local as well as national affairs"; the city's greater concern with problems of renewal, road improvement, schools and similar matters than with growth; the growing interest in FM broadcasting which was not fully anticipated; and the unrealistically low proposals with respect to the number of commercial and non-commercial spot announcements in light of the expanded quality and scope of both experimental and permanent program services on both stations during the daytime and new evening broadcast hours.

With respect to your revised practices concerning the number of spot announcements to be allowed in a given period, you state that this would permit ". . . 4 spot announcements of 1 minute in length or more of lesser duration." The Commission is unable to determine from this statement the total *number* of spot announcements to be allowed in a given period. This matter was inadvertently overlooked when your ....., letter was reviewed. The instructions for answering paragraph 3(b) of Section IV of the application forms, request a statement from the applicant both as to the total *number* of spot announcements as well as the length of spot announcements. You are hereby requested to submit a statement setting forth more clearly the stations' practices with respect to the number of spot announcements to be allowed in a given period.

Further, your application (.....) for renewal of license of Station ..... and your application (.....) for license to cover construction permit for ..... were granted on ..... and ....., respectively, for the term ending on ....., in order to afford you a reasonable opportunity to demonstrate to the Commission that your earlier proposals are being effectively carried out. The earlier proposals were made in applications (.....) for assignment of licenses of Stations ..... and ..... filed by you on ..... The Commission must rely on the program proposals made by its applicants in acting upon the applications before it. Said proposals remain in effect, unless amended, and, in your case, constituted in large part the basis for the Commission's action on your applications. Absent a change in circumstances in the needs and interests of the community, the Commission expects its licensees to adhere to such proposals. *In re Application of KORD, Inc.* (FCC 61-878), July 13, 1961. After a careful review of your letter, the Commission is unable to determine the factual basis of your conclusions that the needs and interests of your community have changed. Accordingly, you are hereby requested to submit detailed facts concerning the basis of your conclusions as to the alleged changes in the needs and interests of your community, including information as to why such alleged changes were not foreseeable at the time the Commission acted on your applications (.....).

Very truly yours,

/s/ BEN F. WAPLE
Ben F. Waple
Acting Secretary

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In the Supreme Court of the United States

October Term, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 212

PATRICK HENRY, DAVID D. LARSEN, STEWART B. KETT, JAMES B. GLENN, JR., d/b as SUBURBAN BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 302 F. 2d 191. The decision and order of the Federal Communications Commission (J. App. 52-55)[1] is reported at 30 F.C.C. 1021.

[1] "J.App." refers to the joint appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on March 29, 1962 (Pet. App. 6a). The petition for a writ of certiorari was filed on June 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 402(j) of the Communications Act of 1934, 47 U.S.C. 402(j).

QUESTION PRESENTED

Whether the Federal Communications Commission may deny a radio station license on the ground that the applicant is unfamiliar with the community proposed to be served and has made no attempt to familiarize itself with the community's needs and interests.

STATUTE INVOLVED

Certain pertinent sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, are set out in the Appendix to the petition (Pet. App. 7a). Section 307(a) of the Act, 47 U.S.C. 307(a), reads as follows:

> The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

STATEMENT

Petitioner, a California partnership, hereafter sometimes referred to as Suburban, filed an application

with the Federal Communications Commission for a permit to construct a new FM radio station in Elizabeth, New Jersey. The application was designated for hearing on issues relating to the interference which the new station would cause to station WNEW-FM, New York City, operated by Metropolitan Broadcasting Corporation (Metropolitan). The Commission made Metropolitan a party to the proceeding because of the interference question, and found that, except as indicated by the specified issues, Suburban was legally, technically, financially and otherwise qualified to construct and operate the proposed station (R. 101-102).[2]

On May 23, 1960, on petition by Metropolitan, which claimed that Suburban's programming proposals had not been designed for Elizabeth, and were essentially identical with the proposals of Suburban in an application for a new FM station at Berwyn, Illinois, and the proposals of two of Suburban's partners for a station at Alameda, California[3] (R. 111-112), the Commission ordered that the issues be enlarged to include the following (R. 241-213):

> To determine whether the program proposals of Suburban Broadcasters are designed to and would be expected to serve the needs of the proposed service area.

Hearing on the issue of the petitioner's program proposals was held on July 12, 1960. The record

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[2] "R." refers to the record filed in the court of appeals.

[3] The application for the station at Alameda was granted; the Berwyn application was dismissed.

showed that none of Suburban's partners had ever resided in Elizabeth, that the program proposal had been prepared in California without any prior consultation or contact with any person in Elizabeth, and that the program schedules for Elizabeth had been copied from those prepared for Alameda.

On October 3, 1960, the Hearing Examiner released an initial decision proposing to grant Suburban's application (R. 368-385). He resolved the program planning issue in favor of petitioner, although he noted that its approach might be characterized as "cavalier" or little more than a "quick shrug" (R. 383).

Oral argument was held before the Commission on April 13, 1961. On July 5, 1961, the Commission, with one Commissioner absent and two dissenting, released its final decision of June 28, 1961, denying Suburban's application (30 F.C.C. 1021). The Commission adopted most of the Examiner's findings, as well as his resolution of the interference question in favor of Suburban. On the issue of programming the Commission reversed the Examiner, stating (30 F.C.C. at 1022):

> We agree that Elizabeth has a presumptive need for a first local FM transmission service. We have generally presumed that an applicant for such a community would satisfy its programming needs, assuming that the applicant had at least a rudimentary knowledge of such needs. However, we cannot indulge in that presumption where the validity of the underlying assumption is questioned, a specific issue is added, and it

is demonstrated that the applicant has taken no steps to familiarize himself with the community or its needs.

The Commission held (30 F.C.C. at 1022):

> It is not sufficient that the applicant will bring a first transmission service to the community—it must in fact provide a first local outlet for community self-expression. Communities may differ, and so may their needs; an applicant has the responsibility of ascertaining his community's needs and of programming to meet those needs. As found by the Examiner, Suburban's principals made no inquiry into the characteristics of Elizabeth or its particular programming needs. The instant program proposals were drawn up on the basis of the principals' apparent belief—unsubstantiated by inquiry, insofar as the record shows—that Elizabeth's needs duplicated those of Alameda, California, and Berwyn, Illinois, or, in the words of the Examiner, could "be served in the same manner that such 'needs' are served by FM broadcasters generally."

The Commission concluded that Suburban's program proposals had not been designed to serve the needs of Elizabeth and that a grant could not be found to be in the public interest. Since Suburban had made no showing as to Elizabeth's programming needs, the Commission stated that it could not determine whether Suburban's program proposals would be expected to meet such needs (30 F.C.C. at 1023).

The court of appeals unanimously affirmed the Commission's order (Pet. App. 1a-5a). The court rejected Suburban's contention that the grant of a license was

mandatory where the sole applicant for a frequency established his legal, financial and technical qualifications. The court ruled that Suburban's view reflected an arbitrarily narrow understanding of the statutory words "public convenience, interest, or necessity", and rejected the contention that any consideration of Suburban's programming proposals was precluded by the statutory proscription against censorship and the constitutional guarantee of free speech. It stated (Pet. App. 4a-5a):

> We think these broad contentions are beside the narrow point at issue upon this record. * * * As we see it, the question presented on the instant record is simply whether the Commission may require that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them.
>
> We think *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), settles the narrow question before us in the affirmative. There, the Commission promulgated regulations which provided, *inter alia*, that no license would be granted to stations whose network contracts would prevent them from developing programs "to serve the needs of the local community." 319 U.S. at 203. National Broadcasting Company challenged the regulations on precisely the grounds appellants advance here: that since the regulations were calculated to affect program content, they exceeded statutory and constitutional limitations. In sustaining the regulations, the Supreme Court held that the Commission may impose reasonable restrictions upon the grant of

licenses to assure programming designed to meet the needs of the local community. We think it clear that the Commission's action in the instant case reflects no greater interference with a broadcaster's alleged right to choose its programs free from Commission control than the interference involved in *National Broadcasting Co.*

ARGUMENT

1. The contention of Suburban that the Commission is required to grant a license to an applicant who is unfamiliar with the community it seeks to serve, and who has made no effort to learn the community's needs and interests, presents no important question warranting further review by this Court.

No act of censorship or other denial of the right of free speech was involved in the Commission's denial of Suburban's application. The Commission did not attempt to determine on the basis of its own judgment that any of Suburban's programs were undesirable or should not be broadcast. It held only that it could not conclude that a grant of Suburban's application would serve the public interest, convenience, and necessity, where, as the court of appeals agreed, the applicant had failed to "demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them" (Pet. 5a).

The Communications Act of 1934 provides that the Commission may issue a radio station license only if the public interest, convenience, and necessity will be served thereby. Sections 307(a), 309(a), 47 U.S.C.

307(a), 309(a). The law is well established that, in applying this standard, the Commission has authority to concern itself with the service to be rendered by a licensee, and that such concern, within the limits adhered to in this case, does not constitute censorship or a denial of the right of free speech. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 215-216, 226; *Simmons* v. *Federal Communications Commission*, 83 App. D.C. 262, 169 F. 2d 670, *certiorari denied*, 335 U.S. 846.[4]

In *National Broadcasting Co.* v. *United States*, *supra*, this Court sustained the validity of the Commission's chain broadcasting regulations, which were designed in substantial part to preserve a licensee's freedom to develop a local program service (319 U.S. at 202-204), stating (319 U.S. at 226):

> We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby

[4] These cases render unavailable petitioner's claim (Pet. 6) that this case marks the first instance of the Commission's assertion of such authority. In *Simmons*, although the proceeding was between competing applications, the appellant's application was denied on non-comparative grounds because the local interests of the community would not be adequately served by the appellant's program policy. See also *KFKB Broadcasting Assn.* v. *Federal Radio Commission*, 60 App. D.C. 79, 81, 47 F. 2d 670, 672; *Trinity Methodist Church* v. *Federal Radio Commission*, 61 App. D.C. 311, 62 F. 2d 850, *certiorari denied*, 284 U.S. 685, 288 U.S. 599.

> denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. * * * The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Suburban clearly has not shown that this principle is any the less applicable today. Despite the increase in the number of competitive broadcast outlets in recent years (Pet. 10), the radio spectrum remains inadequate to accommodate all who seek to use it.[5]

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[5] See Annual Report of the Federal Communications Commission for 1959, pp. 159-160. See also *Bendix Aviation Corp. v. Federal Communications Commission*, 106 App. D.C. 304, 272 F. 2d 533, *certiorari denied sub nom. Aeronautical*

The necessity of protecting the public's interest in the use of scarce frequencies in the public domain has not lessened since 1943.

2. Suburban's further contention (Pet. 11-13) that the Commission's action is inconsistent with this Court's decision in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, misreads that decision.

In the *Sanders* case, this Court held that competitive economic injury to an existing station from the grant of a new facility created standing in the affected station, but that such injury was not a relevant public interest factor to be considered by the Commission unless it resulted in injury to the public. While the Court stated (309 U.S. at 475) that the Commission is given no "supervisory control" over programs, it recognized that the public interest requires consideration by the Commission of the service to be rendered (309 U.S. at 475-476).[6] This decision, which did not directly involve programming, can hardly be read as removing from the Commission's jurisdiction all concern with what the Court described as "[a]n important element of public interest and con-

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Radio, Inc. v. *United States*, 361 U.S. 965, for an example of the difficult problems still arising from an inadequacy of spectrum space.

[6] This Court later cited the *Sanders* and *National Broadcasting Co.* decisions for the proposition that, "Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license * * *." *Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586, 598.

venience", *i.e.*, "the ability of the licensee to render the best practicable service to the community reached by his broadcasts." (309 U.S. at 475.) The Commission's decision here does no more than preserve that ability. As the court of appeals held, the Commission imposed a reasonable test of basic qualification under the public interest standard of the Communications Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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